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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 302

AUGUST P. KUGLER,

Petitioner,

v.

PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

W. Frank Gladney,
Joseph A. Gladney,
Counsel for Petitioner.



INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Opinions below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Specification of errors to be urged	8
Reasons for granting the writ	10
Conclusion	11
Appendix A—Statutes	12
Appendix B—Decisions controlling Louisiana Contracts	

Citations

Cases:

Brady v. *Fid. Mutual Life Ass'n*, 13 Orleans Appeal 35	13
Brown v. *Union Indemnity Co.*, 2 La. App. 505	13
Colfax County v. *Butler County*, 120 N.W. 444, 83 Neb. 803	13
Donnell v. *Gray*, 34 So. 2d 649	9
Erie R. Co. v. *Tompkins*, 304 U.S. 64	8, 13
Greene v. *Banker Indemnity Ins. Co.*, 84 F. Supp. 504	14
Guaranty Trust Co. v. *York*, 326 U.S. 99	9
Harding v. *Metropolitan Life Ins. Co.*, 188 So. 182	8, 13
Leah v. *Woodmen of the World Life Ins. Society*, App. 4 So. 2d 44	13
Leon Israel and Brothers, Inc. v. *U. S. Shipping Board Emergency Fleet Corporation*, 23 Fed. 2d 788	8, 13
McFaden v. *Henderson*, 29 So. 640, 642, 128 Ala. 221	13

Page

Max J. Winkler Brokerage Co. v. *Fidelity & Deposit Co. of Maryland,* 4 Orleans Appeal 341 . . 13
Mer Rouge State Bank v. *Employers Liability Assurance Co. Ltd. of London, England,* 270 F. 567 13
Morvant v. *Russell & Clemmons, Inc.,* 11 So. 2d 47 . . . . . 8, 13
Muse v. *Metropolitan Life Ins. Co.,* App. 191 So. 586 13
Russell v. *Todd,* 309 U.S. 280 9
Six Companies v. *Highway District,* 311 U.S. 180 10
Smith v. *Washington National Ins. Co.,* Appeals 178 So. 691 13
Stoner v. *New York Life Ins. Co.,* 311 U.S. 464 . . 10
Stubbs et al. v. *Emperior Oil & Gas Products Co.,* 114 So. 597 . . . . . 8, 13
Teutonia Ins. Co. v. *Boylston Mutual Ins. Co.,* 20 Fed. 148 14
Wallace v. *Insurance Company,* 1832, 4 La. 289 . . 13
West v. *American T. & T. Co.,* 311 U.S. 223 10
Wheat v. *White,* D.C. 1941, 38 F. Supp. 796 13
Wichita Royalty Co. v. *The City National Bank,* 306 U.S. 103 9
William v. *Life Ins. Co. of Virginia,* 3 Orleans Appeal 34 13
Woodley v. *Hollingsworth,* 98 So. 89 8

Statutes:

La. R.S. 22:654 12
La. R.S. 22:691 10
La. R.S. 22:692 12
La. R.C.C. Article 1951 . . . . . 11, 12
Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U.S.C. 1949 ed., Sec. 1254 (1)) 2
Act of June 25, 1948, c. 646, 62 Stat. 944 (28 U.S.C. 1949 ed., Sec. 1652) 9, 11

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PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on May 15, 1953.

Opinions Below

The opinion of the District Court (R. 178-185) is reported in 105 F. Supp. 158. The opinion of the Circuit Court of Appeals (R. 193) is reported in 204 F. 2d. 297.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 15, 1953. (R. 198). The petition for rehear-

ing was filed with the Circuit Court of Appeals on June 3, 1953; the Circuit Court of Appeals entered an order on June 18, 1953 denying the petition for rehearing filed in this cause. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Question Presented

Whether the lower Courts were bound by the local law (Law of Louisiana) in determining what was a reasonable time in this case for petitioner to complete the necessary repairs to make the insured premises inhabitable; and whether the lower Courts were bound by the local law which control the interpretation of Louisiana Contracts? Since the lower Courts failed to apply or give effect to the Law of Louisiana in interpreting the Insurance Contract The Supreme Court should grant the writ and review this case.

Statute Involved

The pertinent statutory provisions are printed in Appendix A, infra p. 12.

Statement

The respondent issued its Fire Insurance Policy numbered 6867 and dated February 14, 1950 insuring petitioner, August P. Kugler, against loss by fire to his one story frame approved roof, one family dwelling residence located at 4110 Prescott Road, Baton Rouge, Louisiana for any loss that he might suffer from fire to said building up to the sum of Three Thousand ($3,000.00) Dollars. The said policy is in the record beginning at page 8 of the transcript.

While the aforesaid policy was in full force, petitioner, had a fire loss occurring on August 3, 1950, as result of which the respondent paid plaintiff the full and true sum of $189.00 to cover the amount of the loss suffered by petitioner from said fire; that the insured premises became

uninhabitable as a result of the damage done by said fire; and the said repairs were being done and to be done by August P. Kugler, petitioner, to the knowledge of the respondent as shown by its agent in the deposition of Mr. Herbert C. Hart, the investigator for respondent. (See Hart's testimony beginning middle of page 109 of the transcript).

The repairs to the house were completed about the end of September, 1950, as Mr. August P. Kugler testified that when the house caught on fire for a second time on October 22, 1950, that he had completed the repairs of the fire of August 3, 1950, three weeks before the second fire took place.

The said policy was in full force and effect when the second fire of October 22, 1950 damaged the premises. The second fire was investigated and adjusted for respondent by S. D. Hanesworth whose testimony is in the record by means of deposition beginning at page 75 of the transcript; he admitted that he reported the facts of his investigation pertaining to the October 22 fire to respondent on November 14, 1950; that he understood that petitioner was going to do part of the repairs himself; that the house definitely needed the repairs to be completed before any tenants could move in to pay rent for the house.

The draft in payment to petitioner for the damages caused by the second fire was dated November 16, 1950 which he received by mail the following day; Of course petitioner was well aware of the fact that respondent knew that the house was vacant prior to August 3, 1950 and this fact makes Hanesworth's accusations ridiculous to the effect that petitioner tried to make him believe that the house had only been vacant about three weeks; because, if petitioner had said anything about three weeks, no doubt he intended Hanesworth to know that the house was ready for tenants but unoccupied by tenants during the three weeks prior to October 22, 1950 fire.

As soon as petitioner, who held a regular job with Ethyl Corporation, received the check of $260.00 from respondent for the payment of damages done by the second fire on October 22, 1950, he proceeded to buy materials and repair the damages done with the assistance of one, Ellis Lawless; that they continued to work part time and after hours, meaning after their regular jobs, and on week ends to do the repairs and had most of the repairs, except for the painting completed just before Christmas 1950, when Mr. Kugler became ill and was unable to continue the work. (See the testimony of Mr. Kugler, page 48 of the transcript, of Mr. Ellis Lawless, page 69 of the transcript, Mr. Henry Bohlke, page 52 of the transcript, and Mr. and Mrs. I. C. Anderson beginning on page 58 of the transcript.)

The Insurance Policy in question contains a paragraph as follows:

> "COMPANIES OPTIONS—It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and in quality, within a reasonable time, on giving notice of its intention so to do within thirty (30) days after the receipt of the proof of loss herein required."

The proof of loss above referred to was dated November 9, 1950 and was forwarded to the Insurance Company along with Mr. Hanesworth's report on November 14, 1950. Thus the Insurance Company had thirty (30) days in which to exercise its option above quoted after it received the proof of loss which was dated November 9, 1950. This option was exercised only when the respondent paid Mr. Kugler, petitioner, the full and true sum of Two Hundred Sixty ($260.00) Dollars on or about November 17, 1950. Under the terms of the policy Mr. Kugler had no right to do or make any repairs to the house damaged by the fire on

October 22, 1950 until after the respondent had exercised its option above noted. The respondent did exercise its option by paying the petitioner on or about November 17, 1950.

The respondent knew, through its agent, Mr. Hanesworth, that petitioner would make the repairs himself. By Mr. Hanesworth's own testimony, no time limit was given to Mr. Kugler in which to complete the repairs, either at the time of the adjustment of the fire loss or by the terms of the insurance policy. Except for the painting, the repairs were completed within about five weeks or just before Christmas which was approximately forty (40) days more or less before the house became a total loss by fire which occurred on January 30, 1951.

There is no dispute but that the fire damage occurring to the premises on October 22, 1950 rendered the insured house uninhabitable and it remained uninhabitable until the repairs were completed except for the painting about the latter part of December, 1950.

The policy of insurance in question provided among other things that:

> "Unless otherwise provided in writing added hereto, *this Company shall not be liable for loss occurring* . . . (b) *while a described building,* whether intended for occupancy by owner or tenant, *is vacant or unoccupied beyond* the *period of sixty (60) consecutive days.*"

The defendant erroneously construed the policy of insurance and the law applicable to said policy in authorizing its agent, Mr. Herbert C. Hart, to deny liability on the part of the respondent which was done in the latter part of April, 1951 with the statement that the respondent did not feel that there was any liability because the house had been vacant more than sixty days at the time it was a total loss on January 30, 1951 and that the vacancy clause above

quoted applies and voided the policy as to the fire loss in question.

The petitioner contends that the respondent was in error in denying liability in this case and the vacancy clause referred to was not applicable to this case because of the fact that the said policy was made subject to an endorsement known as "form Number 2e," which was attached to the policy and made a part of it and which form included the following paragraph:

> "PERMISSION GRANTED"
>
> *To make* alterations, additions *and repairs* and to complete structures in course of construction, (see Louisiana form number (2-e) beginning at page 16 of the transcript—this form is not authorized or required by Louisiana Law but merely acceptable by custom and used when requested). (See the above clause on the middle of page 21 of the transcript.)

Then the endorsement also included the following paragraph quoted on page 24 of the transcript:

> "WAIVER OF POLICY PROVISIONS: *A claim for loss from perils included in this extended coverage shall not be barred because of vacancy or unoccupancy.*"

The permission granted clauses referred to above is part of the extended coverage added by endorsement and therefore is one of the perils added by the extended coverage by endorsement.

The respondent filed a motion to dismiss and a motion for summary judgment in the trial court. This motion was denied by the trial judge.

The plaintiff then filed a motion for summary judgment by petitioner and offered affidavits and depositions in support thereof. The trial judge denied the petitioner's motion for summary judgment.

When the case was called for trial on the merits, counsel for both parties agreeing that the facts were not in dispute

in this case and believing that the proper decision of the case depended upon correct interpretation of the contract and the application of the Law of Louisiana thereto, submitted the case to the trial judge, waiving trial by jury, for decision.

In the trial court's opinion rendered by Hon. J. Skelly Wright, the serious issue in this case was resolved in favor of the respondent, which the Court said was:

> "The question is whether a reasonable time, exclusive of its sixty (60) days provided in the vacancy clause, existed between that date, November 9, and January 30, the date of the third fire, during which plaintiff could have repaired the damage from the second fire."

The trial Court held that either two weeks or three weeks was a reasonable time for petitioner to repair the damages done by the fire occurring on October 22, 1950 and that thereafter the sixty days' vacancy clause came into operation and ran and held that at the end of the sixty days of the operation of the vacancy clause, the premises were still vacant; but the trial court failed to take into consideration the circumstances, that petitioner was going to make the repairs himself, after work hours and on week ends, and he was not going to have the repairs done by a contractor; thus, the trial court did not base its determination of reasonable time in this case on the circumstances of this case, that is on what was a reasonable time for the petitioner, August P. Kugler, to make the repairs himself at a time that it was convenient for petitioner to complete the repairs. It did not consider the circumstances that petitioner did complete the repairs as soon as circumstances permitted him to do so, but based its determination of what a reasonable time was in this case, on what time it would take a contractor to perform these repairs altho the contract nor the Law of Louisiana required petitioner to have the repairs done by a contractor.

The Court of Appeals simply accepted the trial court's

determination of what a reasonable time was in this case and completely ignored the Law of Louisiana in defining reasonable time and completely ignored the Law of Louisiana which was controlling in connection with the interpretation of this contract and merely stated that the legal principles contended for by petitioner did not apply by saying that it was essential to his right of recovery that the necessary repairs be completed within a reasonable time and erroneously concluded that the trial court's determination of what was a reasonable time in a question of fact.

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In failing to give effect to the definition of reasonable time as required by the law of Louisiana as indicated by the following Louisiana decisions:

Morvant v. Russell & Clemmons, Inc., 11 So. 2d. 47.
Donnell v. Gray, 34 So. 2d. 649
Woodley v. Hollingsworth, 98 So. 89.
Leon Israel and Brothers, Inc. v. United States Shipping Board Emergency Fleet Corporation, 23 F. 2d. 788.
Harding v. Metropolitan Life Insurance Co., 188 So. 182
Stubbs et al. v. Emperior Oil & Gas Products Co., 114 So. 597.

2. In concluding that the determination of what is a reasonable time in this case is a question of fact; since the circumstances in this case from which the trial court determined what is a reasonable time were not in dispute; and, therefore, since the circumstances of this case were not in dispute, the question of what is a reasonable time is simply a question of Law.

3. Since, the law of Louisiana, the insurance contract in question and the respondent insurance company in making settlement with the petitioner for two

hundred and sixty ($260.00) Dollars because of the October 22, 1950 fire on or about November 17, 1950, did not require that the needed repairs be made by a contractor and since the respondent tacitly approved of the petitioner doing the repairs himself at times he was not employed at his regular employment with Ethyl Corporation; the lower Courts erred in using the period of time required of a contractor to make said repairs in determining what a reasonable time was in this case for effecting the said repairs; since a reasonable time must be determined and controlled by the circumstances of this case which did not include the repairs being made or done by a contractor; but included the repairs being done by petitioner on a part time basis.

4. In refusing to follow the decisions of the state Court in the determination of reasonable time and thereby failing to follow the mandate of the Supreme Court of the United States in Erie R. Co. v. Tompkins, 304 U.S. 64; Russell v. Todd, 309 U.S. 280; Wichita Royalty Company v. The City National Bank, 306 U.S. 103; Guaranty Trust Co. v. York, 326 U.S. 99; and the Rules of Decision Act, 28 U.S.C. Section 1652.

5. Since the lower Courts found that a contractor could complete the necessary repairs in eighty (80) to one hundred and twenty (120) hours' time (two or three weeks); the Courts should have found it reasonable for the petitioner to have completed the same repairs during the same number of work hours, from 80 to 120 hours; and it was error for the lower courts to refuse to permit petitioner to complete this the necessary repairs in 80 to 120 hours which work hours would have been accomplished at a time convenient for petitioner to do the work; thus it was error for the lower courts to fail to find that it was reasonable for petitioner to accomplish these repairs in 80 to 120 hours applied at the rate of approximately 20 hours per week or from a total period of from 4 to 6 weeks, as the repairs were actually done by petitioner within the number of work hours that a contractor could do

them and done at a time that it was convenient for petitioner to do the necessary repairs; thus the lower courts could have properly held that petitioner had completed the repairs within a reasonable time and within five weeks and that thereafter the 60 day vacancy period had not run.

6. In refusing to follow the statutory law of Louisiana in connection with the interpretation of the insurance contracts which is controlling in this case* which says if the Court can give two interpretations to the contract, it must take that interpretation which will give effect to the policy and not the view which will render it void. (See Appendix A).

7. In finding that Endorsement Bureau Form No. 2e is required by statute of Louisiana to be included in fire insurance policies in said State (See La. R. S. 22:691). This endorsement gave extended coverage to the insured and to the extent of its terms altered the terms of the standard policy (Required by statutes) and *expressly waived* the *vacancy or unoccupancy* clause as to perils included in this Extended Coverage. (See page 24 of the record.) The permission granted to make repairs clause was included in this endorsement to the standard policy known as La. Form N. 2e for which the respondent required of the petitioner an additional premium of more than fifty percent more than required for the standard Policy. (See page 8 of the record.)

8. In affirming the judgment of the District Court.

Reasons for Granting the Writ

1. Decisions of the Courts below in the instant case failed to follow the Appellate Courts of Louisiana in the definition of reasonable time as given by the Louisiana Appellate Courts, contrary to and in violation of Erie R. Co. v. Tompkins, Supra.

* *Six Companies* v. *Highway District,* 311 U.S. 180;
West v. *American T. & T. Company,* 311 U.S. 223;
Stoner v. *New York Life Insurance Company,* 311 U.S. 464.

The Louisiana cases defining reasonable time are cited above.

2. The decisions of the lower Courts failed to give effect to the Louisiana Law, particularly Revised Civil Code Article 1951 and the Louisiana Cases cited thereunder which required the lower courts to have interpreted the insurance contract in favor of the petitioner where there were two interpretations possible, as in this case; and the lower courts failure to apply the Louisiana Law was again in violation of the Supreme Court's decision in Erie R. Co. v. Tompkins, Supra.

3. Clearly, the lower Court's failure to follow Erie R. Co. v. Tompkins, Supra, and the cases cited, as well as the Rules of Decisions Act, 28 U.S.C. Section 1652, is of sufficient importance to call upon the Supreme Court to exercise its supervisory powers to grant a writ of certiorari and to review this case, so that no injustice will be done, but to the contrary petitioner's rights will be protected in accordance with the Laws of Louisiana.

Conclusion

For the foregoing reasons, petitioner prays that this petition for Writ of Certiorari be granted.

Respectfully Submitted,

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August 28th, 1953.

APPENDIX A

STATUTES

The Louisiana Revised Statutes 22:654—CONSTRUCTION OF POLICIES—reads as follows:

> "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified, by any writing, endorsement, or application attached to or made a part of the policy."

Louisiana Revised Civil Code Article 1951, reads as follows:

> "TWO INTERPRETATIONS POSSIBLE which CONTROLS—when a clause is susceptible of two (2) interpretations, it must be understood in that which it may have some effect, rather than in a sense which would render it nugatory."

Louisiana Revised Statutes Title 22:692 reads as follows:

> "No policy of fire insurance issued by any insurer on property in this state shall hereafter be declared void by the insurer for the breach of any representation warranty or conditions contained in the said policy or in the application thereof. Such breach shall not avail the insurer for the breach of any representation war- shall exist at the time of the loss, and be either such a breach as would increase either the moral or physical hazards under the policy, or (2) shall be such as would be a violation of a warranty or condition requiring the insured to take and keep inventories and books showing a record of his business. Notwithstanding the above provisions of this section, such a breach shall not afford a defense to a suit on the policy if the fact or facts constituting such a breach existed at the time of the issuance of the policy and were, at such time, known to the insurer, or to any of his or any of its officers or agents, *or if the facts or fact constituting such a breach existed at the time of the loss and was,*

at such times, known to the insurer or to any of his or its officers or agents, except in case of fraud on the part of such officer or agent or the insured, or collusion between such officer or agents and the insured.''

CITATIONS

Definition of Reasonable Time

Morant vs. Russell & Clemmons, Inc., 11 So. 2d. 47;
Donnell vs. Gray, 34 So. 2d ,649;
Leon Israel & Brothers, Inc., vs. United States Shipping Board Emergency Fleet Corporation, 23 Fed. 2d. 788;
Harding vs. Metropolitan Life Insurance Company, 188 So. 182;
Stubbs et al. vs. Emperial Oil & Gas Products Company, 114 So. 597;
Colfax County vs. Butler County, 120 N.W. 444, 83 Neb. 803;
McFaden vs. Henderson, 29 So. 640, 642, 128 Ala. 221;

Construction of Louisiana Contracts

Wheat vs. White, D. C. 1941, 38 F. Supp. 796;
Wallace vs. Insurance Company, 1832, 4 La. 289;
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William vs. Life Insurance Company of Virginia, 3 Orleans Appeals 34;
Max J. Winkler Brokerage Company vs. Fidelity and Deposit Company of Maryland, 4 Orleans Appeal 341;
Brown vs. Union Indemnity Company, 2 La. App. 505;
Mer Rouge State Bank vs. Employers Liability Assurance Company Lt. of London, England, 270 F. 567;
Brady vs. Fidelity Mutual Life Association, 13 Orleans Appeal 35;
Leah v. Woodmen of the World Life Insurance Society, Appeal 4 So. 2d. 44;
Muse vs. Metropolitan Life Insurance Company, Appeals 191 So. 586;
Affirmed 193 La. 605, 192 So. 72, 125 A.L.R. 1075;

Teutonia Ins. Co. vs. Boylston Mutual Ins. Co., 20 F. 148;
Greene vs. Banker Indemnity Insurance Company, 84 F. Supp. 504;

SUBJECT INDEX

	Page
Statement of the Case	1
Argument and Authorities	2

TABLE OF CITATIONS

CASES

Albion Lead Works vs. Williamsburg C.F. Insurance Company, (C.C.) 2 Fed. 479	7
Coulson vs. Walton, 9 Pet. 62, 9 L. Ed. 51	10
Farmers M. E. Insurance Soc. vs. Smith, 158 Ky. 459, 165 S.W. 675	7
Gash vs. Home Insurance Company, 153 Ill. App. 31	5
Globe & Rutgers Fire Ins. Company vs. Green, 167 Miss. 698, 146 So. 889	6, 10
Morrell vs. Irving Fire Insurance Company, 33 N. Y. 429, 88 Am. Dec. 396	10
Siegel vs. Ohio M. M. F. Insurance Company, 29 F (2d) 988 (C.C.A. 8th)	9
Terwilliger vs. Union Fire, Accident & General Insurance Company, 185 So. 43 (Or. App. 1938)	3

STATUTES

La. R.S. 22:691	2
La. R.S. 22:692	2
La. R.S. 22:658	13, 14
Act 168 of 1908	13
Act 59 of 1921	13
Act 195 of 1948	13



May It Please the Court:

STATEMENT OF THE CASE

As stated in the Brief for Plaintiff, there is no serious dispute of fact in this matter. The terms and existence of the policy of insurance were admitted by the defendant and are not disputed here. However, certain facts not mentioned by plaintiff should be stressed and defendant herewith desires to reiterate some of the more pertinent facts involved.

The small frame dwelling built by petitioner for rental purposes and situated immediately in the rear of petitioner's home, was vacated on August 1, 1950. (Affidavit of petitioner, page 49 of the Transcript). The house was admittedly vacant in the sense that there was no furniture or other evidence of human habitation contained therein. **The house was never again occupied after August 1, 1950 until its destruction by fire on January 30, 1951.** (See affidavit of petitioner commencing page 48 of the Transcript.)

A fire of August 3, 1950, causing minor interior damage, was settled by the defendant insurer for the sum of One Hundred Eighty-Nine and 20/100 ($189.20) Dollars, with Mr. H. C. Hart, an independent insurance adjuster, representing the defendant. Mr. Hart agreed to pay the amount of this damage and was told by Mr. Kugler that a tenant for the house was expected to take possession about August 7, 1950. (See deposition of Mr. Hart, Transcript page 113.)

Another fire occurred October 22, 1950. This fire loss was adjusted by Mr. S. D. Hanesworth, an employee of the General Adjustment Bureau, Inc., who agreed on behalf of the defendant insurance company to pay petitioner Two Hundred Sixty and no/100 ($260.00) Dollars for the damage and accepted a proof of loss in that amount. (See deposition of Mr.

Hanesworth, page 79 of the Transcript.) In petitioner's Brief, Page 3, he quotes Mr. Hanesworth's testimony as being to the effect that Mr. Hanesworth was notified that the house had been vacant about **two months** prior to the fire of October 22. This is a correct quotation from the deposition, but it is an erroneous answer on the part of Mr. Hanesworth and was later corrected. On page 40 of the Transcript is found an affidavit of Mr. Hanesworth in which he states that the petitioner told him that the dwelling had been vacant or unoccupied for **about three weeks.** Furthermore, on page 105 and 106 of the Transcript will be found Mr. Hanesworth's sworn statement that when he said **"two months"**, he meant to say **"two or three weeks."**

The testimony of Mr. Hart and Mr. Hanesworth as to the representations made to them by the petitioner are uncontradicted by petitioner and must be accepted as entirely true by Your Honors.

It is further pointed out that Brief of Plaintiff on page 8 contains an incomplete quotation of the **"permission granted"** section of Louisiana Form No. 2-E, which constituted an endorsement on the policy in question. The entire wording of this section will be found on page 21 of the Transcript.

ARGUMENT AND AUTHORITIES

The defense herein is based solely upon the 'vacancy clause' of the policy sued upon. This clause provides in effect that a building left vacant for more than sixty days will not be insured unless the company has granted, in writing, permission for such vacancy.

The vacancy clause is found on the second page of the policy in conformity with the mandatory provisions of Louisiana R.S. 22:691; R.S. 22:692. In other words, this provision

is required by the Legislature of Louisiana and is not an arbitrary or restrictive requirement of the company.

The clause is a reasonable one and must be given the effect that it was intended to accomplish. *See Terwilliger vs. Union Fire, Accident & General Insurance Co.*, 185 So. 43 (Or. App. 1938). I particularly desire that the Court should thoroughly realize that an application for an extension of time under the vacancy clause does not mean that the insured will necessarily lose his insurance. The company may grant a written extension, but since the risk is greatly increased, both morally and physically, the company should be granted an opportunity to charge an additional premium for this increased risk. If the assured does not desire to pay for this increased hazard, or if the company, after being apprized of the facts, does not desire to continue insuring the risk, the company should be given an opportunity to cancel the policy as provided by the terms thereof and the applicable statutory law. In other words, the company is merely asking that it be given a chance to exercise good underwriting practices by being notified of the true facts surrounding the acceptance of the risk.

Bureau Form Number 2 e (c) has absolutely nothing to do with the case at bar. This is the endorsement entitled "Permission Granted" and is the provision upon which petitioner is casting his main argument.

Attorney for petitioner would have Your Honor read Form Number 2 e (c) as being simply a permission by the company to the assured for the latter "to make alterations, additions and repairs." Nothing could be further from the meaning of this clause.

In the first place, an assured need get permission from

no private individual to make alterations, additions and repairs to his buildings. In our free country a man can make all the alterations, additions and repairs that he likes and need ask no man for permission to do so.

Furthermore, such permission, although not necessary, has already been granted by Form 2 e (a). It cannot be doubted that the making of alterations, additions and repairs is "use of the premises" as is usual or **incidental** to the occupancy of a dwelling.

Therefore, if we separate the permission to make repairs from the context of the entire provision, we have a clause which is irrational, illogical, unnecessary and meaningless.

However, by the saving grace of the conjunctive **'and'** in that sentence, which gives us the context of the entire provision, we have a clause which is rational, logical, necessary and of great benefit to the assured. **This provision grants the assured additional insurance protection without the necessity of additional premium.** That is **all** that it means.

The company, by this endorsement, is simply telling the assured: "If you engage in alterations, additions and repairs to this building, we will extend the full coverage of this policy to protect lumber and materials to be used in this work if that lumber or those materials are on your premises or adjacent thereto. By 'full coverage of this policy' we mean the amount of insurance you have on your building and do not include any coverage provided in this policy that you may have on furniture or contents."

Although I am unable to supply Your Honor with any judicial precedent to support the above, I think that there can be no doubt that my analysis and interpretation is correct.

In fact, its very simplicity explains the lack of judicial interpretation. Anything as clear as the true meaning of the clause brooks no argument and hence there is no necessity for judicial interpretation.

Petitioner's argument then is to the effect that the vacancy clause cannot apply to a building rendered uninhabitable by fire or some catastrophe beyond the assured's control.

The true answer and the only logical one is this: If that condition is to exist beyond the time provided in the policy, then the assured should, in all equity and justice, abide by his contract, notify the company and obtain a written extension of the time limit; paying the additional premium justified by the increased risk—after all, the company is no more responsible for the fire or catastrophe than the assured and should no more be penalized than the assured.

Of course, there are some instances where this provision should be liberally applied. For instance, petitioner cites Couch on Insurance, Vol. 4, Sec. 970 (1), which in turn refers to *Gash vs. Home Insurance Company, 153 Ill. App. 31.*

The Court in the Gash Case refused to apply the vacancy clause when the assured was forced out of his home by flood waters and was in the act of restoring his home when the fire occurred. However, the vacancy clause in the policy considered there **did not grant the assured a single day of grace,** but was absolute in its terms.

Here, the assured is granted sixty (60) days of grace and therefore the Gash Case has no applicability to the case at bar.

The Schmidt Case, also cited by Mr. Couch, likewise has no applicability inasmuch as the vacancy there was known to the insurer and there was a tacit agreement that the policy would be unaffected.

In all justice, the courts should apply the vacancy clause in a case of uninhabitability if the assured is given ample time to notify the company of the vacancy and apply for a written waiver or extension until the necessary repairs can be effected. See *Globe & Rutgers Fire Insurance Company vs. Green*, 167 Miss. 698, 146 So. 889.

Suppose, however, that we continue to give the assured here the benefit of every liberality and grant him one of two things. Suppose we say either that he has permission from the company to make repairs (Form 2 e (c) or that we will not apply the vacancy clause against him during the period of uninhabitability because it is against reason to expect a person to inhabit an uninhabitable building.

Attorney for petitioner not only insists that we extend this liberality to him, but insists that this should be extended to him for an indefinite period of time; in perpetuity, as it were.

In other words, petitioner says, in effect: "Since my house has been made uninhabitable, the vacancy clause does not apply and cannot apply as long as I do nothing to make my house habitable."

The only just answer to this is to inform him that although we will suspend the vacancy clause for him after a fire or catastrophe, we can only extend it a **reasonable length of time** and then reinvoke it so that it again becomes operative.

The insurance company is entitled to each and every one of the provisions of its contract and there is certainly an implied obligation on the part of the assured to use due diligence as a reasonable man to allow the contract to be operative as a whole so that the true intention of the parties may be carried out.

The insurance company, by requesting this, is doing no more than asking that it be treated by the Court as it has been and will be treated. For example, suppose that the vacancy clause here was absolute, granting no period of delay or days of grace as was the policy provision considered in the Gash Case, supra. The cases are numerous which force the company to allow a vacancy **during a reasonable time.** It has been held that an insured mill was not unoccupied within the intent of the policy because of the fact that it stopped work for five days; *Albion Lead Works vs. Williamsburg C. F. Insurance Co.* (C.C.) 2 Fed. 479. Vacancy for a **reasonable** time during the changing of tenants has been held not to be a violation of a vacancy clause which grants no delay. See *Farmers M. E. Insurance Soc. vs. Smith*, 158 Ky. 459, 165 S.W. 675.

Clearly, if the assured is to be granted the benefit of a "reasonable time", the corresponding duty should be imposed upon him, to state the converse, a corresponding right should be granted the company.

To recapitulate, there is no true, just reason for suspending the operation of the vacancy clause where the house has been rendered uninhabitable, **if the vacancy clause of itself grants the assured sufficient delay in which to make the necessary repairs.** If it is going to be necessary to take more than the delay allowed to make these repairs, the assured should be required to live up to the terms of his contract by applying to the company for a vacancy permit and, if required, paying the increased premium justified by the increased risk.

If, on the other hand, it is to be held that the uninhabitability of the building is to suspend the operation of the vacancy clause, then it certainly follows that the assured should use all due diligence to make the building habitable and should

be granted only a **reasonable time** before which the vacancy clause is reinvoked and the insurance company given the benefit of all of the provisions of its contract.

In determining what is a reasonable time, several things must be considered:

First of all, the intention of the parties. It was the intention of the parties to this contract to insure an **occupied** dwelling and the consideration of the contract was established on this basis.

Secondly, the wording of the contract itself. The insurance company, in effect, agreed to insure an occupied dwelling but stated: "Without additional premium, we will agree that you may leave this house vacant and thereby increase our risk for period of sixty (60) days, **but no more.** If you desire to increase our risk beyond this, you must first obtain our written permission so that a premium adjustment can be made if we deem it necessary."

Thirdly, the character of the premises and the purpose for which they were intended to be used. This dwelling was designed and built solely for the purpose of producing revenue to the owner. It was purely and simply rental property. The owner in effect tells the company: "This house is nothing to me but a revenue producer. If anything happens to it, I will **immediately** restore it so that I can again place it into commerce and again start realizing income from it. If it is not occupied, it represents a liability rather than an asset to me. You may consider this when entering into this contract with me."

Finally, the object to be accomplished by the provision and the degree of protection to be effected thereby. The objective of the vacancy clause has been discussed above and does not need repeating. However, it should be again pointed

out the reasonableness of it is not questioned and that the company should not be required to assume the increased risk without first being notified that it is being called upon to do so.

Considering these factors, it is earnestly submitted that sixty (60) days was ample time in which assured could have repaired the damage done either on August 3, 1950 or on October 22, 1950. That this time had already been extended to assured by the vacancy clause itself and hence the assured has been guilty of breach of contract sufficient to deny him recovery.

In the alternative, and only in the event that the Court finds that the vacancy clause was suspended for a reasonable time after each fire, it is submitted that the assured's failure to use due diligence in making these repairs reinvoked the vacancy clause more than sixty (60) days prior to the time of the total loss on January 30, 1951, and liability should be denied.

Counsel for plaintiff states in effect, that the sixty (60) day vacancy clause was not effective for a period of thirty (30) days after the receipt of the proof of loss because the company could have elected to repair during that time.

It is true that the policy contained the usual option or election provision, but the company's election to pay, rather than replace or repair, had already been exercised. The testimony of both Mr. Hart and Mr. Hanesworth will show that at the time of the adjustment of both the August 3rd and October 22d fire, they told petitioner that he would be paid. Such an election may be exercised by any acts or statements which clearly signify an intention to elect, whether directly by the company or by a representative thereof. See *Siegel vs. Ohio M. M. F. Insurance Co.*, 29 F (2d) 988 (C. C. A. 8th),

Coulson v. Walton, 9 Pet. 62, 9 L. Ed. 51, *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 88 Am. Dec. 396, *Globe & Rutgers Fire Ins. Co., v. Green*, 167 Miss. 698, 146 So. 889.

A case almost parallel to the one at bar is *Globe & Rutgers Fire Insurance Co. v. Green*, 167 Miss. 698, 146 So. 889, wherein the Supreme Court of Mississippi, considering a thirty (30) day vacancy clause had this to say (146 So. 890, 891):

> "To go over again briefly the outstanding facts: The first fire, May 18, 1930; proof of loss, June 10th thereafter; the adjustment and settlement of the loss prior to June 25th; check for the amount on that date; the second loss, August 24th; the residence unoccupied between the two fires; no vacancy permit applied for nor granted. After the first fire and until the second, the residence was uninhabitable. Appellant received the proof of loss not later than June 11th, because the evidence shows that on that date Patterson and the adjuster had about adjusted the loss. The evidence shows with absolute certainty that some days prior to the 25th of June the whole matter of the loss had been agreed upon between Patterson, acting for appellee and the mortgagees, and appellant, and on that day appellant's check was issued for the amount of $398, payable as stated above.
>
> (2) Appellee's contention is that the vacancy clause in the policy was suspended during the thirty-day period in which appellant had the right to exercise its option to repair, and that the option began on the 27th of June. Appellee fixes that date because, as above shown, it was noted on the back of the proof of loss as the date the proof was received by appellant. Appellee relies on the principle declared by the Supreme Court of Nebraska in Lancashire Insurance Company v. Bush, 60 Neb. 116, 82 N. W. 313, and Schmidt v. Williamsburgh City Fire Ins. Co. 98 Neb. 61, 151 N. W. 920. The court held in those cases that after a partial loss, under a fire policy, which

renders the building uninhabitable, the insured is not guilty of a breach of the vacancy clause of the contract where he permits the property to remain unoccupied pending the period during which the insurer is authorized to exercise his option to repair the damaged building. Applying that principle, appellee argues thus: Proof of loss made June 27th. Appellant had thirty days, until July 27th, to exercise its option to repair. During this time the thirty-day vacancy clause was suspended; therefore, time did not begin to run against the thirty-day vacancy clause until July 27th, and the residence was destroyed on the 24th of August, within the thirty-day vacancy period.

We do not decide whether the principle laid down by the Nebraska court meets our approval or not; it is not necessary to do so. We hold that the principle has no application where the evidence shows, as it does in this case, that within the thirty-day option period the insurance company waives the option by proceeding with and consummating an adjustment of the loss. That was done in this case, and the adjustment was concluded some days prior to the 25th of June, the date of appellant's check covering the amount. The notation on the back of the proof of loss of its receipt by appellant on June 27th amounts to nothing as against the undisputed fact that appellant, or its authorized agent, had prior to that time received notice and proof of loss, and the loss had been adjusted. These facts were either undisputed or shown by the overwhelming weight of the evidence: Proof of loss furnished not later than the 11th of June. Instead of exercising its option to repair, appellant proceeded at once to adjust the loss with appellee's agent and attorney. It was adjusted not loter than two or three days before the 25th of June. On that date appellant issued its check for the amount of the loss agreed upon. This settlement was binding on appellee for the reasons above stated. Appellant's thirty-day option to repair expired not later than July 11th. The second fire was on the 24th of August,

more than thirty days after the expiration of appellant's option to repair. However, looking at appellee's position in the most favorable light, concede that appellant's thirty-day option to repair did not begin to run until the adjustment had been agreed upon. This occurred a few days before the 25th of June, put it the 23d of June, adding the thirty-day option to that would take it to the 22d of August; the fire occurred on the 24th, therefore the property was vacant in violation of the vacancy clause for the space of two days. We do not think the facts of the case and the law justify that view. If there was any suspension of appellant's option to repair, it began when proof of loss was made, which was not later than June 11th, and ran for thirty days, and therefore ended not later than July 11th, and if there was a thirty-day vacancy clause it began to run on that date and expired not later than August 11th, thirteen days before the fire.

Therefore, Your Honors are urged to enforce the contract according to the terms thereof and the intention of the parties. Undue leniency is not requested by the defendant, nor should it be shown petitioner. Your Honors should "hew to the line of correct judicial procedure and let the chips fall where they may." Defendant is satisfied that this will be done. However, in closing, I think that it should be pointed out to Your Honors again that the petitioner does not come into Court with 'clean hands'. The vacancy clause should have, and probably would have, been invoked by this defendant as a result of the October 22d fire if petitioner had told Mr. Hanesworth the true facts about the vacancy of the house instead of misrepresenting to him that the house had only been vacant "about two or three weeks." (See Mr. Hanesworth's deposition, Transcript, Page 75, et seq.)

In the event that this Honorable Court determines that the insurance company should have paid petitioner under the

terms and conditions of the policy in dispute, petitioner asks that penalties in the sum of 25% and reasonable attorney's fees be assessed against the defendant. On Page 25 of his Brief he cites to the Court Louisiana R. S. 22:658. It will be noted that the assessment of penalties and attorney's fees will only be made against an insurer when the insurer's failure to pay is found to be "arbitrary, capricious, or without probable cause . . ." It is perfectly apparent that the insurance company's defense in this matter is a serious one and under no circumstances should penalties and attorney's fees be assessed against it. The mere fact that the Trial Judge agreed in the defense and awarded judgment in favor of the insurance company, certainly should be ample notice to petitioner that neither the insurer nor the Trial Judge was acting arbitrarily, capricious, or without probable cause.

However, if penalties and attorney's fees are assessed, then the penalties should only be 12% instead of 25%. The interpretation of Louisiana R.S. 22:658 can only be correctly given when its codification and history are considered. By Section 3 of Act No. 168 of the Louisiana Legislature of 1908, it was provided that the failure of an insurance company to pay the amount of a fire loss within sixty (60) days from the receipt of the proof of loss imposed upon it penalties of 12%, together with reasonable attorney's fees.

By Section 3 of Act No. 59 of the Extra Session of the Louisiana Legislature of 1921, the Legislature set the penalties on insurance companies "engaged in the business of insuring automobiles, trucks, motor propeller vehicles and other property against fire and theft" at 25% of the amount of the loss. These two (2) statutes, one dealing with immovable property and the other with movable property, were codified into the Louisiana Insurance Code by Act No. 195 of the Lou-

isiana Legislature of 1948, by Section 14.48 of said Code. The Codal provision was adopted into Louisiana R.S. 22:658. Considering the history of this statute it becomes perfectly apparent that any penalties to be attached against immovable property should remain at 12% and that the proviso, under the maxim *ejusdem generis* be applied to movable property only.

Defendant urges the dismissal of the complaint.

Respectfully submitted:

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CERTIFICATE

I certify that a copy of the foregoing brief has been mailed, postage prepaid, to Gladney, White and May, Attorneys for plointiff.

Baton Rouge, Louisiana, January _____, 1953.

ROBERT W. WILLIAMS, JR.